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Supreme Court of the United States

October Term, 1964

No. 464

L. W. HOLT AND E. A. DAWLEY, JR.,
Petitioners,

v.

COMMONWEALTH OF VIRGINA,
Respondent.

BRIEF FOR RESPONDENT

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OPINION BELOW

The conviction of petitioners (hereinafter sometimes referred to as defendants) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the cases of *L. W. Holt* v. *Commonwealth of Virginia*, Record No. 5630, and *E. A. Dawley, Jr.* v. *Commonwealth of Virginia*, 205 Va. 332, 136 S. E. (2d) 809. The two cases were heard together. The judgment of the Court was entered on June 15, 1964.

JURISDICTION

1. Certiorari was granted on January 18, 1965.

2. The jurisdiction of this Court is said to be invoked under 28 U.S.C., Section 1257 (3).

PRELIMINARY STATEMENT

It is well for this Court to bear in mind just what this case really is and not be misled by the distortion of the evidence made by counsel for petitioners, and the unsupported allegations. Counsel would have you believe that these petitioners were punished for contempt because they are members of the bar who represent so-called civil rights litigants. This is not correct. They were punished because they were in contempt of court for the reason they insulted the presiding judge of the Third Judicial Circuit of Virginia, in open court. The power to punish summarily in such cases is clearly prescribed by Virginia statute, Code Section 18.1-292, Code of Virginia[1]

STATEMENT OF THE CASE

E. A. Dawley, Jr. was counsel for the defendants in the case of *Hopewell News, Incorporated* v. *Curtis Harris, et al.* This case was set for trial in the Circuit Court of the City of Hopewell on October 5, 1961. Subpoenas were issued for the appearance of the twelve defendants. The City Sergeant

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[1] "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

"(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Section 18.1-292 Code of Virginia 1950, as amended.

reported to the Court on October 5 that defendants could not be found. The Court directed that other additional subpoenas be issued, returnable on October 6. This direction was done in the presence of E. A. Dawley, Jr. On October 6 the Sergeant again reported that the defendants could not be found.

On that day, an agreement was reached between the parties, and while the dismissal order was being prepared, Curtis W. Harris, one of the defendants who had been twice summoned was seen in consultation with E. A. Dawley in the court room. After the final order was entered dismissing the said suit as "Dismissed Agreed," Judge Holladay had the clerk of the court and counsel, including Dawley, appear before him in chambers. There the Judge "asked Dawley whether he, Dawley, had anything to do with the said witnesses [those having been summoned on two occasions] being unavailable to be served with subpoenas" (R.13). The question was propounded three times to Dawley. He failed and refused to answer. He requested time to consider same. Thereupon, the court directed him to appear on October 10, 1961, at ten o'clock. On that day, he was again given an opportunity to give his answer to the said question, which he failed to do. The matter was continued until December 11th. On that date (December 11) Holt stated to the court that he did not represent Dawley. "I am out of the case at this moment, if there is a case" (R. 10). The Judge then directed the Commonwealth's Attorney to prepare a show cause order against Dawley, which rule was made returnable January 8, 1962, to show why he (Dawley) should not be held in contempt. Dawley moved that the Commonwealth file a bill of particulars, which motion was granted. On January 8 the hearing on the rule was continued until January 30, 1962. Motion for change of venue was filed on January 17, 1962. Pertinent parts thereof are found on R. 2 and R. 3.

The complete stenographic record of the hearing on January 30, 1962, at which time the contempt was committed, is found on R. 16 to R. 29, inclusive. Nothing of any consequence transpired before argument was made by Holt on the *motion for a change of venue* (R. 11). The argument largely consisted of reading the motion to the Court (R. 11 to R. 15). In the course of the argument, the following was stated:

> ". . . The said Honorable Judge Carleton E. Holladay . . . is now in effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carleton E. Holladay did intimidate and harass the lawyer representing E. H. Dawley, Leonard W. Holt, Esq." (R. 13)

The written motion for change of venue which was signed by E. A. Dawley, Jr. contained this statement:

> "The said Judge Carleton E. Holladay . . . has with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecuting witness, adverse witness for the defense, grand jury, chief prosecutor and judge.
>
> "That in addition to the foregoing, said Judge Carleton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq." (R. 2)

At the conclusion of the argument made by Holt, the Court announced "that the plea is contemptuous, I think the argument is contemptuous." At that time, both E. A. Dawley, Jr. and Leonard W. Holt were summarily adjudged to be in contempt of court.

Before fixing the punishment, the Court overruled the motion for a change of venue [in the first contempt case] (R. 17), after which a dialogue between L. W. Holt and the Court ensued in which the defendants registered a supposed disclaimer of intent, which was characterized by the Supreme Court of Appeals of Virginia as follows:

> "These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize."

At the conclusion of this colloquy, the Court fined each of the defendants $50.00. It is from this judgment that an appeal was taken to the Supreme Court of Appeals of Virginia, and is now before this Court.

QUESTION BEFORE THIS COURT

Whether there were grounds for a change of venue or for the disqualification of the judge are not issues in this case. These issues were not presented to the State appellate court for determination as the first contempt case was never brought to a conclusion and neither are these issues presented here.

The only question fairly presented in this court is whether the petitioners were accorded procedural due process in their contempt conviction.

It is the contention of the Commonwealth that the petitioners received the punishment their conduct warranted and all due process requirements were met.

SUMMATION OF THE RESPONDENT'S POSITION

The position of the Commonwealth can be summarized as follows:

I. A Virginia statute empowers a State tribunal to summarily punish for contempt in open court. That statute has been construed by the State courts and applied to the instant case.

II. The State tribunal having found the petitioners guilty of contempt under the State statute, it remains only to determine if the United States Constitution, as construed by this Court, has been impinged upon or circumscribed by the State action.

III. The United States Constitution does not demand notice, hearing, jury trial, or other cloaks of protection contemplated by "due process" in summary contempt cases.

IV. The rights of litigants to plead or pursue remedies, and the privilege of counsel to effectively represent their clients do not extend to unsupported allegations of corruptness, prejudice and unfitness of a trial judge.

ARGUMENT

Petitioners Were Accorded Due Process of Law

I.

Both Client and Counsel Were In Contempt and Were Properly Convicted and Summarily Punished

Petitioners argue, on pages 8 and 9 of their brief, that their conviction for contempt based upon the contents of a motion for a change of venue denied one of them as a litigant in the State Court the right guaranteed by the due process clause of the Fourteenth Amendment to be prosecuted in an impartial forum and denied the other as the litigant's attorney the right to represent his client effectively. Petitioners were not punished for filing and arguing a legitimate motion for a change of venue. They were punished for

filing a motion for a change of venue containing abusive, contemptuous and contemptible language concerning the trial judge, and arguing the motion in open court using the same abusive language.

Counsel would have this Court believe that Judge Holladay's action interfered with Holt's professional duty to effectively represent his client Dawley. This is not correct. The only thing appearing in the record concerning the argument on the motion (exclusive of the motion itself) is this:

"The Court:

* * *

"I believe you all have a plea filed here for change of venue?

"Mr. Holt:
"Yes, sir.

"The Court:
"I'm ready to hear you on that.

"Mr. Holt:
"May it please the Court, the defendant, E. A. Dawley, Jr., represents as follows on motion for change of venue:

(Then follows the argument):

"The Court: Next we have action of the Court on a motion for change of venue. Mr. Jones, do you wish to be heard on that?

"Mr. Jones: No, your honor. I don't think there's any argument that I would present at this time.
"I wholly concur with the Court that that is contemptuous, and I don't propose to answer it at all.

"Mr. Holt: May we at this time, my client and I, ask

again of the Court—the motion for jury trial—My understanding was that you denied this earlier.

"The Court: I have not passed on the motion for jury trial at this time. I think that I would have to pass on the motion for change of venue before I would for a jury trial.

"We first have to find out whether we are going to try it in this Court; and then we will determine whether or not it is a jury trial.

"If there is nothing further to be heard on the motion for change of venue, the Court is ready to rule on it.

"Motion is denied.

"Mr. Holt: May we note an exception, sir.

"The Court: Let the record show the exception."

To substantiate petitioner's argument, counsel cites the case of *Re McConnell*, 370 U. S. 230, 236, quoting certain dictum therefrom. The situation in the *McConnell* case was entirely different from the case at bar. There, the trial court had instructed attorneys to refrain from asking questions on subjects which the court had ruled not admissible. McConnell felt that the trial court was in error in this particular (which in fact it was) and he felt that he must ask the questions in order to make up the record for an appeal (if necessary). He stated to the court that he was going to ask the questions until stopped by some bailiff. Thereupon, the court recessed. After the resumption of the trial, McConnell did not ask the questions. This Court reversed, thereby construing 18 U.S.C.A., Section 401[2], to apply the cases where

[2] "§ 401. *Power of court*

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

the misbehavior of the alleged contemptor amounts to an actual obstruction of the administration of justice. Mr. Justice Harlan pointed out in a dissenting opinion, joined by Mr. Justice Stewart, that he did not believe that the Court intended in its opinion to mean that only a physical obstruction appending judicial proceedings is punishable under the said federal statute, citing many cases decided by this Court to the effect that "the Court's power to punish summarily for contempt has always been available as a sanction against the use of abusive and insulting language" (82 S. Ct. 1293).

Be that as it may, the Court in this case is not called upon to apply the provisions of the federal statute. Here the Court must apply the Virginia statute (Section 18.1-292, Code of Virginia (1950)), which statute is broader than the act of Congress and vests the courts of Virginia with the specific power to punish summarily for contempt as a sanction against the use of abusive and insulting language. The Supreme Court of Appeals of Virginia, in passing upon the question of whether or not the conduct of the petitioners amounted to contempt within the meaning of the Virginia statute, stated (205 Va. 338):

> "We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?
>
> "We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession

"(2) Misbehavior of any of its officers in their offiicial transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra*, §11, page 396. He was charged with:

> "(1) Acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge;
>
> "(2) Harassing and intimidating counsel for the accused;
>
> "(3) Being unable to conduct a fair and impartial trial.
>
> "It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as amended." (205 Va. 338.)

Thus we have a situation here where the highest court of the State has construed one of the statutes of that State to be applicable to a given set of facts. Now petitioners ask this Court to construe those facts differently and say that the Virginia statute is not applicable. Is it for this Court to say that a State is powerless to authorize its courts to punish for contempt committed in the presence of the court under some whim that due process is violated? It would seem to us that the construction placed on a statute and the procedure thereunder placed upon it by the highest court of the State should be followed by this Honorable Court, unless the State procedure *clearly* contravenes the due process clause of the Fourteenth Amendment as this Court has in-

terpreted the same. No such showing has been made in this case that the procedure followed in Virginia has denied the petitioners any constitutional rights; and no relevant cases decided by this Court have been cited by petitioners. We submit that the decision on the Virginia decision made by the Virginia Supreme Court of Appeals should be followed by this Honorable Court. *Leavenworth County* v. *Barnes,* 94 U. S. 70. The general rule in this connection is stated in Sutherland Statutory Construction, 3rd Edition, Horack Volume Two, Sections 2101-5211, Section 4604:

> "The federal courts are bound to follow interpretations of state statues by the state courts of the state in which the statute was enacted. But where the construction of a state statute is governed by the United States Constitution the federal courts will make an independent interpretation of the statute, although the interpretations of the state courts may be given weight in determining the meaning of their laws."

We then direct the Court's attention to the decisions of this Court to determine if the action of the State tribunal has contravened the United States Constitution as so interpreted.

A.

Due Process Does Not Require Notice and Hearing In Summary Contempt

In *Ex Parte Terry,* 128 U. S. 289, 32 L. Ed. 405, 410, in refusing to grant relief in a habeas corpus proceeding to the applicant who was imprisoned as a result of being held in contempt of court, the Court stated:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its

presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice.'

* * *

"We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded 'to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution.' We have seen that is *a settled doctrine* in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed *in the face of the court*, at least one of superior jurisdiction, *the offender may*, in its discretion be instantly apprehended and *immediately imprisoned*, without trial or issue, and without other proof than its *actual knowledge of what occurred;* and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the dis-

> orderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence." (128 U. S. 412.) (Italics supplied).

In *Fisher* v. *Pace,* 336 U. S. 155, 159, 93 L. Ed. 569, 573:

> "Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."
>
> * * *
>
> "The judgment of the Supreme Court of Texas must be affirmed. In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

It is abundantly clear that this Honorable Court has long recognized that courts may punish for contempt when the contempt is committed in the actual presence of the court and that public policy demands that reliance and confidence

must be placed in the presiding judge, be that judge a Federal judge or a State judge. In either category, the judge represents the majesty of the law upon which orderly society rests. His actions in this particular should not be impeded except for compelling reasons. No such reasons appear in the case at bar.

Counsel for the petitioners seek to equate the case at bar with the case of *In re Oliver*, 333 U. S. 257. Similarity between the two cases is totally lacking. Oliver appeared before a circuit court judge who was conducting in accordance with Michigan law a "one man grand jury investigation." The hearing was conducted in the Judge's chambers from which the public was excluded. During the course of the secret session after hearing evidence from another witness and from Oliver, the Judge, believing that Oliver was not telling the truth, summarily held him in contempt. No opportunity was afforded Oliver to offer an explanation or a defense. This Court released Oliver in a habeas corpus proceeding, holding that the commitment constituted a denial of due process on the ground (1) of the secrecy of the proceeding and (2) of lack of reasonable opportunity to be heard on the contempt charge. The case at bar differs from *Oliver* in two respects. First, petitioners were adjudged in contempt in open court and, secondly, no explanation could disprove the fact that petitioners had committed such contempt of the court's authority and dignity which deserved instant punishment. This case comes within the second exception expressed in the dissenting opinion in the case of *Ungar* v. *Sarafite*, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. (2d) 921.[3]

[3] "I would hold, therefore, that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, except when (1) the contempt creates such 'an open threat to the orderly procedure of the court. * * [that if] not instantly suppressed and

In that case *(Ungar* v. *Sarafite)*, the Court, in affirming a judgment of the Supreme Court of New York, held that the remarks of a witness that he was being badgered and coerced and that the Court was suppressing evidence, did not constitute such a personal attack on the Judge as to require his disqualification.

Petitioners' reliance upon the cases of *In re Oliver,* 333 U. S. 257, and *In re Murchison,* 349 U. S. 133 is ill-conceived. The mere fact that certain language was used by this Court in the opinion in the *Oliver* case was not a license for the petitioners to use the same language in the said motion for change of venue where the circumstances and facts of the case at bar are entirely different from those in *In re Oliver*. Certainly, the holding in these cases by this Honorable Court does not divest a State court from punishing for contempt committed in the presence of the Court. This Court, in the case of *Ungar* v. *Sarafite, supra,* clearly differentiates the contempts in these two cases from contempts committed in open court. We quote from the opinion:

> "In re Murchison, 349 U. S. 133, 99 L ed. 942, 75 S. Ct. 623. The Court in the latter case held that a judge acting as a one-man grand jury investigating crime could not convict for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings and is not controlling here. For both In re Oliver, 333 U. S. 257, 92 L. ed. 682, 68 S. Ct. 499, and Murchison make abundantly clear that the Court was not dealing therein with the

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punished, demoralization of the court's authority will follow.' *In re Oliver, supra,* at 275 of 333 U.S., at 508 of 68 S. Ct. 92, 92 L. Ed. 682, quoting *Cooke* v. *United States,* 267 U.S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767, and when (2) 'no explanation could mitigate [contemner's] offense, or disprove the fact that he had committed such contempt of [the court's] authority and dignity as deserved instant punishment.' Ex parte Terry, 128 U.S. 289, 310, 9 S. Ct. 77, 81, 32 L. Ed. 405." (84 S. Ct. 857).

> traditional category of contempts committed in open court, which cannot be likened to the so-called contempts committed in *in camera* grand jury proceedings, especially when the latter are founded upon perjury charges." (3-76 U. S. 584).

To punish summarily for contempt committed in the presence of the court does not violate due process. *Ex parte Terry,* 128 U. S. 289, 313, 32 L ed. 405, 9 S. Ct. 77; *Fisher* v. *Pace,* 336, U. S. 155, 159-160, 93 L ed. 569, 69 S Ct. 425; *Sacher* v. *United States,* 343 U. S. 1, 8, 96 L ed. 717, 72 S Ct. 451; *Green* v. *United States,* 356 U. S. 165, 2 L ed. 2d 672, 78 S Ct. 632; *Ungar* v. *Sarafite,* 376 U. S. 575.

Counsel in the brief on page 10 makes this statement: "for the language contained in the venue change motion in issue does not remotely approach the outer perimeter of decorous pleading."

We do not agree with counsel. It may be customary for attorneys to use such language in pleadings in the jurisdictions in which said counsel habitually practice, but such a practice is simply not tolerated in Virginia where the members of the Bar take pride in maintaining the respect of the courts.

The Supreme Court of Appeals of Virginia had this to say in reference to the duty of attorneys in respect to their relationship with the Court:

> "Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and

motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases annotated on this point in 18 A.L.R. 213, 55 A.L.R. 530; 52 A.L.R. 2d 1297. See also Dangel, 'Contempt,' §118, at page 58; 12 Am. Jur., Contempt, *supra*, §13, at pages 397-398." (205 Va. 339).

B.

No Rights To Plead Or Be Effectively Represented Were Denied In This Case

The petitioners have laid much emphasis in their brief upon the litigant's right to file a pleading in a court. Although this question was dealt with exhaustively in the State court, it may be well to once again explore the nature of this pleading.

Change of venue is unknown in Virginia in contempt cases. Section 19.1-224 of the Code[4] sets forth the authority for change of venue *in criminal cases*. Affidavits of disinterested persons are required to support the application for a change of venue. *Boswell* v. *Flockheart*, 8 Leigh (35 Va.) 364; *Wormeley* v. *Com.*, 10 Gratt. (51 Va.) 658; *Muscoe* v. *Com.*, 87 Va. 460, 12 S. E. 790. It is rather startling to note that not one affidavit of a disinterested person was filed by the petitioners to support the wild allegations in the said motion for change of venue. Hence, Judge Holladay was confronted with bare allegations and nothing more.

In this connection, the Court's attention is invited to the tactics employed by petitioners in the complaint filed in the United States District Court (R. 6).

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[4] "§ 19.1-224. A circuit court may, on motion of the accused or of the Commonwealth, for good cause, order the venue for the trial of a criminal case in such court to be changed to some other circuit or

corporation court and in like manner the court of a corporation may order the venue to be changed to some other corporation or circuit court. Such motion when made by the accused may be made in his absence upon a petition signed and sworn to by him, which petition may, in the discretion of the judge, be acted on by him in vacation; and, whenever the mayor of any city, or the sheriff of any county, shall call on the Governor for military force to protect the accused from violence, the judge of the corporation court of the city or the circuit court of the county having jurisdiction of the offense shall, upon a petition signed and sworn to by the accused, whether he be present or not, at once order the venue to be changed to the corporation court of a city or the circuit court of a county sufficiently remote from the place where the offense was committed to insure the safe and impartial trial of the accused."

LIGON L. JONES, Commonwealth's Attorney of the City of Hopewell, Virginia, and individually
Suite No. 1, Perry Building
Hopewell, Virginia

and

J. HAMILTON HENING, Clerk of the Circuit Court of the City of Hopewell, Virginia, and individually
Circuit Court
Hopewell, Virginia, *Defendants*

COMPLAINT

16. That thereafter, acting under color of law and the authority of his official position, the said Carleton E. Holladay, signed a piece of paper styled a Rule to Show Cause, a copy of which was served on your Complainant in Norfolk, Virginia, (copy attached as Complainant's Exhibit B) which said rule to show cause required that your Complainant appear in said Circuit Court on January 8, 1961 to stand trial for contempt of court for failing to answer said questions propounded by said Carleton E. Holladay. That on January 8, 1962, your Complainant appeared in Court for trial, but the Court continued the case, on the motion of the Commonwealth's Attorney, to January 30, 1962, on the grounds that said Commonwealth Attorney was not prepared for trial, all to the harassment, inconvenience, and expense of the Complainant and for the purpose of intimidating, humiliating and inconveniencing your Complainant.

Filed January 25, 1962
Walkley E. Johnson, Clerk
United States District Court

E. A. DAWLEY, JR.

In the complaint filed in the case instituted by Dawley against Judge Holladay on January 24, 1962 (filed January 25, 1962) in the United States District Court for the Eastern District of Virginia (R.6) seeking, among other things, a temporary restraining order and an injunction against the Judge from proceeding further in the contempt action, there is stated the following:

> "16. That on January 8, 1962, your complainant appeared in court for trial, but the court continued the case, on the motion of the Commonwealth's Attorney to January 30, 1962, on the ground that said Commonwealth's Attorney was not prepared for trial, all to the harassment, inconvenience and expense of the complainant and for the purpose of intimidating, humiliating and inconveniencing your complainant."

This complaint was signed by Dawley and verified.[5]

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[5] UNITED STATES OF AMERICA: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

No. 3414

E. A. DAWLEY, JR., *Complainant*

versus

CARLETON E. HOLLADAY, Judge of the Circuit Court of the City of Hopewell, Virginia, and individually, Wakefield Virginia

STATE OF VIRGINIA
CITY OF NORFOLK, to wit:

This day personally appeared before me, Madilyn J. Cornick, a notary public of and for the City aforesaid in the State of Virginia, E. A. Dawley, Jr., who after being duly sworn, made oath that the statements contained in the foregoing Complaint are true to the best of his knowledge and belief.

E. A. DAWLEY, JR.

Subscribed and sworn to before me this 23rd day of January, 1962.

MADILYN J. CORNICK
(Notary Public)

Holt represented Dawley in this proceeding before Judge Oren Lewis. Judge Lewis in the afternoon of January 29, 1962, refused to act, holding that the case did not fall within any of the exceptions of Title 28, USC 2283, *and that under Title 28 U.S.C. 1342 (3) as amended in 1957, there should be more than bare allegations to justify action.* No further attempt was made by the petitioners to prosecute this case and the same was dismissed for want of prosecution on the 8th day of February, 1965.

In the Statement of Facts and Incidents of Trial* *tendered* by *petitioners* there appears this in reference of what transpired on January 8, 1962:

> "8. Because Dawley had not been served with the said Rule to Show Cause prior to January 8, 1962, the trial date was rescheduled for January 30, 1962."

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* See Records Nos. 5630, 5631, in the Supreme Court of Appeals of Virginia at Richmond, *L. W. Holt* v. *Commonwealth of Virginia* —*E. A. Dawley, Jr.* v. *Commonwealth of Virginia* (red pamphlet), pages 10, 11 and 12:

"(As tendered by L. W. Holt and E. A. Dawley).

"STATEMENT OF FACTS AND INCIDENTS OF TRIAL.

* * *

"8. Because Dawley had not been served with the said Rule to Show Cause prior to January 8, 1962, the trial date was rescheduled for January 30, 1962.

* * *

/s/ E. A. Dawley, Jr.
/s/ L. W. Holt."

My commission expires December 7, 1965.

A true extract—Teste:

Walkley E. Johnson, Clerk,
United States District Court.

by: Glover N. Buck
Deputy

Jordan, Dawley & Holt
Attorneys at Law
721 E. Brambleton Avenue
Norfolk, Virginia

Hence, it appears that petitioners either falsified in their pleading before Judge Lewis or they falsified in the state of facts and incident of trial tendered to Judge Holladay, for in the one they say that Dawley was not served with the show cause order and in the other that he was served.

It would seem that petitioners owe this Court an explanation of the variance between the allegations made before the District Court and the facts as they actually were and are disclosed in this record.

Again, there is nothing in the record to indicate that Judge Holladay did not consider everything which was presented to him by the petitioners in making the motion for a change of venue. We submit that reasonable minds cannot differ as to the motive behind the filing of bare allegations of prejudice, harassment, etc. The court had no other honorable course open; the motion was insulting, and the court dealt with it accordingly.

Judge Holladay had before him the same unsupported allegations that Judge Lewis had and refused to act upon. The difference between the two pleadings is self-evident; in the pleading before the District Court the allegations were directed toward another tribunal—in the pleading before the State court the allegations were directed to the integrity of the judge of that court.

The motion for a change in venue, say the petitioners, was filed for the purpose to avoid trial by Judge Holladay. The record shows that Judge Holladay had overruled Dawley's motion on December 28, 1961, twenty days before the motion for a change of venue was filed, (R. 6). Did the petitioners in good faith believe that the Judge would reverse his prior ruling with nothing to support the allegations in said motion? If they really believed in their motion, then why did they fly to the United States District Court *before* Judge Holladay had an opportunity to pass on said motion?

If there was any real merit to their contention that the Judge was biased, then why did they not have the allegations in the petition supported by affidavits made by disinterested persons? The said motion among other things alleges that the Judge "did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley; viz, Leonard W. Holt." (R. 2). The only specific acts charged to the Judge's conduct is what transpired on January 8, 1962, at which time Holt was *not* representing Dawley. (R. 3, 6). Furthermore, Holt denied he represented Dawley on December 11, 1961. (R. 9). Hence, the only time Holt appeared as counsel for Dawley in this proceeding prior to January 30, 1962, was on October 10, 1961. On that date (October 10), the case was continued to December 11 at Holt's request. The record fails to disclose any form of harassment of Holt on October 11, while he represented Dawley. So all this talk about Judge Holladay harassing and intimidating counsel has no foundation whatsoever and this was known or should have been known to both Dawley and Holt before they villified the Judge in this motion.

How can it be said that the argument made to the Court was not disrespectful or insulting? Judge Holladay who saw and observed the petitioners when the motion was argued found that it was. "I think the plea is contemptuous, the argument contemptuous." (R. 16). "In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing and attitude of the petitioners." *Fisher* v. *Pace*, 336 U. S. 159.

We submit that the motion for a change of venue was neither relevant, presented in good faith or made with respect, and the Supreme Court of Appeals of Virginia was

correct in characterizing it as a vehicle used for the purpose for launching a personal attack upon the integrity or honor of the Court.

Petitioners argue that the case at bar requires a non-summary hearing before a disinterested judge in accordance with the provisions of Federal Rules of Criminal Procedure, Rule 42(b). As the contempt in this case was committed in the presence of the court, the same would be covered under paragraph (a) of said rule,[7] if the rule were applicable in State courts, which we submit it is not. However, it is well to note that the Virginia statute (Section 18.1-292, Code of Virginia (1950)) authorizes summary punishments for contempts committed in the presence of the court just as Rule 42(a) authorizes federal courts to punish for contempt if same is committed in the presence of the court.

There is no provision in the statute, to-wit, Virginia Code Section 18.1-292, or any other statute that provides for disqualification of a judge in a contempt proceeding where the acts of contempt were committed in the presence of the judge. Nor is there a rule issued by the Supreme Court of Appeals covering the subject of contempt similar to Rule 42, Federal Rules of Criminal Procedure. The change of venue statute, to-wit, 19.1-224, Code of Virginia, is certainly not applicable in summary contempt proceedings. In this connection, see, comments of the Supreme Court of Appeals on page 37 of the record:

The Supreme Court of Appeals of Virginia, in answering the argument presented by petitioners for a change in venue and for the disqualification of the Judge, had this to say (205 Va. 339):

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[7] "(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record." Federal Rules of Criminal Procedure, Rule 42 (a).

"The statutory authority for change of venue in criminal cases in Virginia is codified as §19.1-224 of the Code and we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

"Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra*, §13, page 398; 29 A.L.R. 1273."

Virginia follows the general rule that when the contempt is committed in the presence of the court or judge the court may proceed upon its own knowledge of the facts without further proof. Long ago the Supreme Court of Appeals of Virginia, relying on *Ex parte Terry, supra,* and other authorities, affirmed a conviction of contempt resulting from the publication of an article using vicious language against the judge in whose court the contemner had been recently convicted. In the case of *Burdett* v. *Commonwealth* (1904), 103 Va. 838, 48 S. E. 878, 68 L.A. 251, 106 Am. St. Rep., the Court said:

"Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form."

This is the law today in Virginia and was the law when Judge Holladay held petitioners in contempt on January 30, 1962.

C.

The Record Fails To Disclose Any Reason For The Disqualification Of The Trial Judge

We submit that applying the standards governing contempt convictions which this Court has applied in federal cases, there is nothing in this record which indicates that Judge Holladay should have disqualified himself as the action taken by him in holding petitioners in contempt was necessary to maintain the authority and dignity of the Court over which he presided.

On pages 5 and 28 of their brief, counsel for the petitioners go outside the record in their struggle to vindicate the conduct of these petitioners. They tell the Court that the law firm of which the petitioners were partners was embroiled in litigation with the Virginia Legislative Committee on Offenses Against the Administration of Justice before the Federal Court for the Eastern District of Virginia (209 F. Supp. 131) during the fall of 1961. Of course, they failed to connect Judge Holladay with that case because the Judge had nothing at all to do with the same. The incident which precipitated the *Jordan* case (*Jordan* v. *Hutchinson*, 323 F. (2d) 597) occurred in the City of Norfolk, far removed from the City of Hopewell. The bald and unwarranted statement of counsel that the pendency of said case was a related circumstance to the case at bar is not supported by the facts and apparently is a deliberate attempt to prejudice this Court against the Commonwealth of Virginia in *this case*. If counsel's argument is sound then it would mean that the mere existence of said litigation in

the Federal Court by the law firm with which the petitioners were partners would be a license for the petitioners to insult any judge in any State Court throughout Virginia, because all judges throughout Virginia would be charged with the knowledge of such pending case and would thereby be "affected by the prejudice which gripped so many other members of the community." Such an argument is too far fetched to receive serious consideration.

To repeat, there is nothing in this record to indicate to the slightest degree that Judge Holladay was affected by the alleged community prejudice.

II.

Petitioners Were Not Subject To Harassment In This Contempt Proceeding On Account Of Being "Civil Right Lawyers"

We fail to grasp the significance of the petitioners' argument made in this connection. Counsel representing unpopular causes have no greater privileges to practice than counsel in other cases. The adjudication that petitioners were in contempt did not arise in a case while the petitioners were representing "civil rights litigants," whatever that term may mean. Certainly, the mere fact that petitioners as attorneys had represented civil rights litigants in the past gave them no license to use abusive language towards the Judge in pleadings filed and in arguments made.

The written motion for a change of venue was filed on January 17. 1962, some nine days after the last contact the petitioners had with the Judge at the hearing on January 8, 1962. The argument on said motion was made on January 30, 1962, some twenty-two days after said hearing on January 8, 1962. Hence, it is obvious that the petitioners' conduct in this respect amount to a deliberate attack on the

integrity of the court and designed for no other reason than to bring the court in disrepute.

It is the duty of an attorney to refrain from abusive language and maintain a respectful bearing toward the court. Dangel, Contempt, Section 118.

Regardless of how the petitioners may have felt towards the Judge and regardless of how they may have believed that there was a hostile feeling towards them in the community, this constituted no reason to launch a personal attack on the integrity and honesty of the Judge. Certainly, the mere fact that they had represented civil rights litigants in the past gave them no license to do this.

CONCLUSION

Contrary to the contemners' illusion, they were not punished for their advocacy in unpopular causes. Their conviction springs from the concept that courts are entitled to the respect of litigants and lawyers and must be accorded the dignity demanded of that station.

Perhaps the concept is wrong. Conceivably, the framers of that idea erred in the notion that the judicial branch of government must be protected against acrimonious assaults by those displeased with the decisions of the courts or the judges making those decisions.

Possibly, even though valid at the inception of our judicial system, the time has come to change that concept. Although perhaps wedded too long to the idea of sanctity of the Courts, we of Virginia still entertain the belief that the concept was right when enunicated, and nothing has changed over the years to make it less valid today. Irrespective of the popularity of his cause, an advocate in Virginia's courts will be expected to conduct himself with decorum and a respectful attitude.

If an orderly society is to survive; if our system of government is to continue; if the citizen's rights and liabilities are to be adjudicated in a peaceable manner by an impartial arbitrator; the person of that arbitrator, and the forum in which he functions, must be free of personal abuse and assaults by those upon whom the courts are called to sit in judgment.

Admittedly, our judicial branch of government is vested with tremendous power. While necessary to hold that power in check against abuse, it is equally essential that those exercising that power be unfettered by fear and free from personal assaults.

Judges must be at liberty to exercise their best judgment in an atmosphere of dignity without regard to the repercussions of unpopular causes and the clamoring of militant groups and crusading reformers.

Irrespective of the course of other states, the Courts of the Commonwealth of Virginia intend to maintain that atmosphere.

It is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia was clearly right in upholding the action of the Circuit Court of the City of Hopewell, Virginia, in summarily punishing the petitioners for contempt, and that judgment should be affirmed by this Court.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

D. GARDINER TYLER
Assistant Attorney General of Virginia

FRANCIS C. LEE
Special Counsel

Supreme Court-State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Melvin L. Wulf, Esq., Leslie Harold Levinson, Esq., Joseph A. Jordan, Esq., Edward A. Dawley, Esq., and Len W. Holt, Esq., counsel for petitioners, by depositing the same in a United States post office mail box, with first class postage prepaid, at their addresses shown of record to be c/o American Civil Liberties Union, 156 Fifth Avenue, New York 10, New York, and to Marvin M. Karpatkin with first class postage prepaid at his address 660 Madison Avenue, New York, New York, on this 14th day of April, 1965.

D. GARDINER TYLER
Assistant Attorney General